In the Matter of License No. 14419
Issued to: FREDERICK SUNDLOF

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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FREDERICK SUNDLOF

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 24, 29 and 31 August, 1 and 7 September, 1949, Appellant appeared before an Examiner of the United States Coast Guard at New York City to answer a charge of negligence supported by two specifications. The first specification alleges that while Appellant was serving as Master on board the American SS CHRYSANTHYSTAR, under authority of his duly issued license, he did, on or about 25 June, 1948, maintain excessive speed, while said vessel was navigating in thick fog and under conditions of poor visibility, thereby contributing to a collision between the CHRYSANTHYSTAR and the fishing vessel ENERGETIC. The second specification alleges that Appellant did, while serving as above and on the same date, fail to supervise properly the navigation of said vessel, in that he left the bridge in charge of an unlicensed and inexperienced seaman, thereby contributing to the above mentioned collision.

At the hearing, Appellant was fully informed as to the nature of the proceeding, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to each of the two specifications. The Investigating Officer then made his opening statement and Appellant's counsel deferred his right to submit an opening statement on behalf of the person charged. Counsel reserved his right to make an opening statement upon completion of the Investigating Officer's case in chief.

The Investigating Officer then introduced in evidence the testimony of the Chief Engineer and the Third Assistant Engineer of the CHRYSANTHYSTAR for the voyage in question. He also introduced the written testimony of the Acting Third Mate who had been on watch at the time of the collision. This testimony had been taken on 11 August, 1948, during the investigation which had been conducted in New York City to determine the cause of the disaster. After objection to this evidence had been made and subsequently withdrawn, the testimony was received by the Examiner as one of the Investigating Officer's exhibits. Other exhibits received in evidence are a photostat of an excerpt from the deck log book dated 25 June, 1948; a photostat of the engine room bell book dated 23
June, 1948; a chart of the English Channel, H.O. 4434; and a copy of the Report of Marine Casualty made in connection with the collision. After having submitted the above evidence, the Investigating

Officer rested his case.

Appellant's counsel made a motion to dismiss both specifications and the charge on the ground that the evidence submitted failed to support the charge or either of the specifications to the extent of making out a prima facie case. The motion was denied with respect to each of the specifications as well as the charge.

In presenting his case, Appellant's counsel obtained the testimony of the present Investigating Officer, the Investigating Officer who conducted the preliminary investigation at New York City in August, 1948, and the Appellant. The two Investigating Officers were subjected to extensive examination.

Counsel attempted to elicit information from the present Investigating Officer concerning statements made in Europe and forwarded to the Coast Guard for use in the preliminary investigation at New York. Counsel had made application for the complete record of the investigation, in conformance with Title 46 Code of Federal Regulations 136.13, but he did not receive these statements sent from Europe. Counsel requested compliance with his request for such information but nothing was done about it although the Examiner suggested adjourning until Appellant could request the statements from the Commandant of the Coast Guard.

Counsel questioned the Investigating Officer, who had conducted the preliminary investigation, in connection with this officer's authority to tell Appellant that no action would be taken against Appellant's person as the result of the investigation. Despite this statement, Appellant's and other testimony taken at the investigation were referred to the Department of Justice by the Coast Guard. As a result, Appellant was arrested and is being prosecuted in the United States District Court for the Eastern District of New York on charges growing out of this collision.

After Appellant had testified under oath as to the events in connection with the collision and the surrounding circumstances, the motion to dismiss on the ground of insufficient evidence was renewed and again denied. Both parties then made oral arguments and were given an opportunity to submit proposed findings and conclusions. When none were submitted, the Examiner made his own findings of fact and concluded that the charge and both specifications had been "proved". He thereupon rendered his opinion and entered an order suspending Appellant's License No. 14419 for a period of one year.

From that order dated 7 September, 1949, this appeal has been taken, and it is urged that:

POINT 1. The Examiner's findings of fact Nos. 3, 8, 9, 11, 12, 13 and 14 are not supported by competent proof. And the finding that both specifications were in all respects "proved" is excepted to.

POINT 2. It was a serious violation of Appellant's constitutional rights for the Investigating Officer conducting the preliminary investigation to have obtained Appellant's testimony upon the assurance that no action would be taken against Appellant's person. Such testimony was partially the basis for the institution of criminal proceedings against

Appellant.

POINT 3. The withholding of some of the documents which had been used in the preliminary investigation and which had been applied for by Appellant in accordance with Title 46 Code of Federal Regulations 136.13 constitutes reversible error if the documents in question contain any information which might be in any respect favorable to Appellant's defense. Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

At all times mentioned herein up to and including 25 June, 1948, Appellant was serving as Master on board the American SS CHRYSANTHYSTAR, a Liberty tanker, under authority of his duly issued license.

Just prior to that leg of the voyage covering the date of 25 June, 1948, the Second Officer of the ship had been hospitalized in the Dutch West Indies; the Third Officer was promoted to Second Officer; and Appellant attempted by telegraph, by letter and by verbal requests to the local agent to get another Third Officer flown down from New York. When promises of a new Third Officer failed to materialize, Appellant questioned all the deck crew to find out if any of them had experience as a watch officer. As a result of this, Appellant found an unlicensed seaman who had sailed as Third Mate on another ship and the latter was promoted to Acting Third Officer rather than delay the sailing time.

Under these circumstances, the CHRYSANTHYSTAR took departure from the Dutch West Indies enroute to Newcastle-on-Tyne. The Acting Third Officer regularly stood the Third Officer's watch and handled it satisfactorily under Appellant's supervision on the voyage across the ocean. When the ship arrived at Newcastle-on-Tyne, Appellant contacted the American Consul and the local agent in a further attempt to sign on a Third Officer for the return trip. He was unable to obtain the services of either an American or a British Officer. But he did get two English seamen to replace two members of the crew who left the ship. The ship subsequently left Newcastle-on-Tyne on 23 June, 1948, with the same Acting Third Officer standing the 8 to 12 watch. Both of the new men were also on the 8 to 12 watch, one as the lookout and one as the helmsman.

On the evening of 25 June, 1948, the CHRYSANTHYSTAR was steaming seaward in the English Channel on course 250 degrees true at full speed ahead which was approximately 11.5 knots (72 R.P.M.). At 1948, a heavy fog of varying densities set in and considerably reduced the visibility. The Chief Mate was on watch and the Appellant went to the bridge and took control of the navigation of the ship. He remained there until after the time of the collision. At the same time, the engines were put on standby and the fog whistle was commenced being sounded about every minute and a half. In accordance with standing orders to the engine room, speed was reduced from 72 to 69 R.P.M. when the telegraph was changed from full ahead to standby. This was done in foggy weather to facilitate stopping and reversing.

The Acting Third Mate relieved the Chief Officer for the 8 to 12 watch. The Appellant was

still on the bridge and in charge of the navigation of the ship. As the ship approached Lizard Head Lighthouse, Appellant left the wheelhouse and went through the connecting passageway to the chartroom in order to take bearings on the radio direction finder located therein. At this time, the fog was very patchy and visibility varied from one ship's length to one mile. The sea was moderate; there was a light westerly wind; and the vessel was not making any appreciable leeway.

Appellant was in the chartroom long enough to turn on the direction finder, allow it to warm up, and obtain a bearing on Land's End. Appellant considered Lizard Point a very dangerous point of land and had gone into the chartroom to see how soon the ship would be clear of it. The bearing obtained was unfavorable but still he did nothing about reducing speed from 69 R.P.M. since he was anxious to avoid any effect from the erratic behavior of the current. Appellant thought the current possible could have caused the ship to run aground at Lizard Point if they proceeded at a slower speed.

Shortly after Appellant left the wheelhouse, the lookout on the forecastle reported by telephone a small craft dead ahead and very close. When this message was received by the Acting Third Mate at 2053, he did not give any engine or wheel orders but immediately relayed the message to Appellant. In a matter of about three seconds, Appellant had reentered the wheelhouse, changed the telegraph to full astern and given the order of "Hard left" to the helmsman. The engine room answered immediately and the latter order was executed at the same time.

The Third Assistant Engineer was on watch in the engine room when the full astern order was received at 2053. He was standing six feet away from the throttle and rushed to close it sufficiently to reverse the engines. Then the Chief Engineer, who happened to be present in the engine room, reversed the engines and opened the throttle. No time was lost in carrying out the order to reverse the engines to full astern.

Although the order to the helmsman was intended to offset the swing of the stern to port as well as to use the rudder as a brake to stop as quickly as possible, there was a slight swing of the bow to starboard before the collision occurred. Appellant did not see the craft before the ship hit it because the weather was very foggy and visibility was one-half to one ship length. And Appellant did not hear any fog signals from the boat nor were any reported to him. But he did know that at the speed which he says was being made, it would take approximately 90 seconds for the ship to stop in a distance of about 900 feet - two ship lengths.

At 2054, the forecastle lookout reported over the phone that the ship had struck the boat. Appellant immediately ordered the engines stopped when about in the middle of the wreckage of the fishing vessel which had been hit. At 2055, full astern was again rung up and lighted life rings were thrown over the side. A boat was lowered and was away from the side of the ship at 2100. While the boat was searching for survivors, according to the deck log, the ship maneuvered to avoid the "heavy traffic" and also to remain in the vicinity of the accident. The collision took place about ten miles east southeast of Lizard Head Lighthouse.

The lifeboat returned to the ship at 2210 with two survivors. One of the men was in good

condition but the other was unconscious and died. The bodies of the other four occupants of the fishing vessel were not recovered. The boat was identified as the F/V ENERGETIC. Appellant contacted the proper authorities about the accident and executed the required Report of Marine Casualty.

On the date of the collision, Appellant was serving under authority of his License No. 56656. Subsequent to this time, the above license expired and Appellant was issued the new License No. 14419 on 3 September, 1948.

Appellant had been going to sea since 1910 and numerous letters of recommendation from different shipping companies were read into the record at the hearing. Appellant's prior disciplinary record consists of three admonishings for misconduct and a four months' suspension of his Master's license in 1945 for negligence in connection with the grounding of the SS CHARLES NORDHOFF.

OPINION

Appellant contends on appeal (and in his hearing argument which is incorporated into the appeal brief) that certain specified findings of fact made by the Examiner and the allegations set forth in the two specifications are not supported by competent proof. (Point 1)

According to Appellant's argument he is under the mistaken impression that it is necessary that the evidence must be "beyond a reasonable doubt" in order to support such findings and conclusions. The degree of proof required is that there must be "substantial evidence." (Administrative Procedure Act, sec. 7(c); 46 Code of Federal Regulations 137.21-5) Substantial evidence is evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred when taking into consideration all the facts presented; and the evidence need not point entirely in one direction. As will be amplified below, the record indicates that the Examiner fully complied with these requirements except as specified herein.

The findings of fact of the Examiner which are attacked by Appellant as not being adequately supported by the evidence are numbers 3, 8, 9, 11, 12, 13 and 14.

Finding number 3 pertains to the speed of the ship just prior to the time of the collision. Both the Third Assistant Engineer who was on watch and the Chief Engineer who was also in the engine room testified that the ship was making 69 R.P.M. - 11 plus knots. The only testimony opposed to this is the Appellant's statement that he could tell by looking over the side that the ship was making approximately 8 knots. In spite of the conflicting testimony, it is certainly reasonable to believe that the ship was making 69 R.P.M. at the time of the collision. Hence, the required substantial evidence is present.

With respect to findings numbers 8, 9, 11 and 12, they are adequately supported by the evidence except insofar as the meaning of the word "bridge" is concerned; and also the meaning of "in charge" in connection with finding number 12. According to my findings of fact above, Appellant left the wheelhouse and went to the chartroom which is technically part of the "bridge."

But it seems evident that in making his findings, the Examiner simply failed to draw this fine distinction which is urged by Appellant to be erroneous. Since the meaning conveyed by the Examiner's findings is no different than in my findings and the ultimate result is not affected by the change, the questionable error is corrected by changing "bridge" to read "wheelhouse" in findings of fact numbers 8, 9, 11 and 12. And since there is no evidence which contradicts Appellant's testimony that he retained control of the navigation of the ship while he was in the chartroom, the words "in charge" contained in finding number 12 must be understood to mean that the Acting Third Mate was present on the bridge only physically and was not actually in control of the navigation of the ship. The finding that the Acting Mate did not give any orders but called the Appellant further supports Appellant's contention.

As regards finding number 13, the actions of the Acting Third Mate obviously indicate that he was not competent to handle the situation which developed. In view of the unlicensed status of the watch officer, the finding might be justified but it becomes irrelevant because of my finding that he was not "in charge" of the bridge with respect to the navigation of the ship.

The last finding of fact objected to by Appellant is number 14 which is the ultimate finding that both "immoderate speed" and the bridge being "in charge of an unlicensed and incompetent watch officer" contributed to the occurrence of the collision. In line with my discussion of the matter infra, it is my opinion that the part of the finding pertaining to immoderate speed is supported by substantial evidence. My preceding comments concerning the status of the Acting Mate are sufficient to eliminate that portion of the finding which states that he was in charge of the bridge. Furthermore, the immediate action taken by Appellant when informed of the presence of the fishing boat indicates that Appellant could not have taken action soon enough to have avoided the collision even if he had been in the wheelhouse when the lookout made his first report. Consequently, the second specification is found "not proved" since the conclusion with respect to it must ultimately be based on finding of fact number 14.

Appellant also contends that the first specification is not supported by competent evidence. And in his argument, Appellant specifically sets forth his reasons for taking this position. He argues that the ship was moving at a moderate speed of approximately eight knots; that the Investigating Officer made no effort to show what would be considered moderate speed under the existing conditions; that the specification alleges the vessel was operating in "thick fog" but the testimony shows that the ship was operating "through a series of fog banks"; that it was necessary to maintain a speed of eight knots to avoid the possibility of running aground upon Lizard Point; that the Investigating Officer failed to sustain the burden of showing what other traffic could reasonably be expected to be in the neighborhood; and that there is no evidence to show what the other vessel was doing with respect to complying with the rules of navigation.

I would like to preface the discussion of the above points by stating that although this is not a proceeding based on any statute other than Title 46 United States Code 239, it is apparent, for two reasons, that Appellant was negligent if he committed the offense alleged in the first specification: first, because the offense would be a breach of a statutory rule of navigation which Appellant was bound to know and observe; and, secondly, because the rule in question is merely declaratory of the

universal rule which requires prudence and caution under circumstances of danger. The statutory rule referred to is the first paragraph of Article 16 of the International Navigation Rules (33 United States Code 92) which states:

> Every vessel shall, in a fog, mist, falling, snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

And, as indicated above, excessive speed in thick weather is a fault, irrespective of the statute.

What constitutes moderate speed in a fog depends upon all the circumstances of the particular case. All the cases of moderate or immoderate speed turn on questions of prudence and negligence. Hence, they cannot be solved merely by applying mechanical tests. However, some factors in determining whether the speed is moderate are the general standards of seamanship established by the courts; the density of the fog; the place where the vessel is navigating; the likelihood of meeting other vessels; the compliance of the other vessel with the rules of navigation; and any other conditions affecting the vessel's own safety or the safety of others.

Appellant urges that his ship was proceeding at a moderate speed of eight knots and he has cited Potter v. William F. Humphrey (1939) 1939 A.M.C. 382, in support of this contention. This case held that the POTTER was at fault for maintaining a speed of approximately 10.5 knots in a moderate fog but that it was possible that the collision would not have resulted if speed had been reduced to eight knots which would have been two-thirds of the normal full speed of twelve knots. The court concluded that there had not been a sufficient reduction from the normal full speed of the vessel. In Appellant's case, I have found that the ship was proceeding at a speed of eleven plus knots and not at eight knots as is argued by Appellant. Since the normal full speed of the CHRYSANTHYSTAR is approximately 11.5 knots, the "two-thirds" rule suggested in the case cited does not in any way support Appellant's argument that his ship was proceeding at a moderate speed.

In The Cheruskia (1899), 92 Fed. 683, the court said that where the full speed of a steamer was 10.5 to 11 knots, a reduction of from 1 to 1 1/2 knots in a fog still leaves the speed excessive. The reduction, even in a moderate fog, should be at least to two-thirds of full speed.

And in The Wm. F. Humphrey (1939), 26 F. Supp. 1, affirmed 120 F. 2d 1011, it was stated that a reduction from the normal speed of 12 knots to slightly over 10 knots was not sufficient to avoid liability for a collision.

It has been stated that "something must be left to the judgment and discretion of the master" in determining what constitutes moderate speed. The Umbria (1897), 166 U.S. 404; to the same effect, Lie v. San Fran. & P.S.S. Co. (1917), 243 U.S. 291. But this discretion "must be exercised not wholly as a matter of individual judgment or of individual views as to what is moderate speed, but also with due regard to the interpretation of the term `moderate speed' by the maritime courts and to the general standards of good seamanship established by those courts in applying the term `moderate speed.'" The Sagamore (1917), 247 Fed. 743.

The broadest rule, which is set out in numerous cases, is that to determine whether a given rate of speed of a steamer is moderate or excessive in view of the particular circumstances is that such speed only is lawful as will permit the steamer seasonably and effectually to avoid a collision by slackening speed or by stopping and reversing within the distance at which an approaching vessel can be seen. The Catalina (1937), 18 F. Supp. 461, affirmed 95 F. 2d 283. And it has been generally held that moderate speed is less than normal full speed when there is a substantial amount of fog. The speed must be substantially reduced, even if the fog is not dense, so long as visibility is seriously affected. The Cheruskia (1899), 92 Fed. 683; The Pennland (1885), 23 Fed. 551.

It was stated in the case of The State of Alabama (1883), 17 Fed. 847, that moderate speed has reference to all the circumstances affecting the steamer's ability to keep out of the way, including her own power in backing, and requires a reduction of speed according to the density of the fog.

Many cases have applied the "visible distance" test while others have held that a vessel is not proceeding at moderate speed in a fog if she cannot be stopped dead in the water in one-half the visibility before her. The Silver Palm (1938), 94 F. 2d 754, certiorari denied 304 U.S. 576. Still other cases have emphasized the point that the vessels must be able to stop, not within the distance of visibility but before they collide. The Umbria (1897), 166 U.S. 404; The Nacoochee (1890), 137 U.S. 330. And if the steamer collides with a sailing vessel "the burden is upon, and the presumption against, the steamer." The Sagamore (1917), 247 Fed. 743.

Considered in the light of the standards set out in the above cases, it appears that Appellant was operating his ship at an excessive rate of speed when proceeding at only slightly less than her normal full speed of 11.5 knots. Appellant admits that the vessel was operating under conditions of poor visibility; that the maximum visibility at the time of the collision was one ship length; and that the backing power of the ship at a speed of only eight knots was such that she could not be stopped in less than two length's of the ship. Hence, the CHYRSANTHYSTAR could not have stopped in time to have avoided the collision even if the boat had been sighted at the distance of maximum visibility - one ship length. Since Appellant has not brought his case within any of the courts' definitions of moderate speed, he cannot be said to have exercised properly his judgment in determining what constituted moderate speed. It was the Investigating Officer's duty to attempt to prove that the CHRYSANTHYSTAR was proceeding at an immoderate speed rather than to show what would be considered moderate speed under the existing conditions.

Appellant also contends that although the specification alleges the vessel was operating in "thick fog" the testimony shows that it was moving "through a series of fog banks." Since what constitutes moderate speed in a fog varies with the existing conditions, a higher rate of speed is permissible when the fog is light than when it is thick. Despite Appellant's testimony that the visibility varied from one ship length to one mile, there is ample evidence to support the finding that the ship was in thick fog at the time of the collision. Appellant himself testified that he never did see the fishing vessel before the collision occurred. In addition, if fog is or should be known to be ahead, a vessel's speed must be so reduced as to be moderate, at least by the time she enters it. In the case of The City of Alexandria (1887), 31 Fed. 427, it was stated that:

"Even if this were a case of an abrupt, dense bank of fog, which, upon the testimony, is not probable, she had no right to run into the fog bank at full speed. She was bound to slow down previously, because otherwise she could not comply with the rule that requires her to be going at `moderate speed' the moment she is in it."

Consequently, even if the CHRYSANTHYSTAR had run into the thick fog just prior to the time of the collision, Appellant was required to have moderated the ship's speed before entering the dense fog so as not to be proceeding at an excessive speed upon encountering it.

It is urged by Appellant that it was necessary to maintain a speed of eight knots to avoid the possibility of running aground upon Lizard Point. First, it is again pointed out that the speed of the CHRYSANTHYSTAR was found to be something in excess of 11 knots rather than 8 knots. As previously stated, the place where the vessel is navigating is one of the factors to be considered in determining what moderate speed is under the existing circumstances and conditions. Appellant did not specifically state that the ship was running at the slowest speed consistent with steerageway. Even assuming that is what he meant, the courts have held in numerous cases that it is no excuse for a collision that a steamer cannot hold her course without running at a speed immoderate in a fog. The Pennsylvania (1873), 86 U.S. 125; The H. F. Dimock (1896), 77 Fed. 226; The Eagle Point (1903), 120 Fed. 449; The Sagamore (1917), 247 Fed. 743. And excessive speed cannot be justified on the opinion of the ship's officers that the vessel could not be properly controlled at a lower rate of speed. The Eagle Point (1903), 120 Fed. 449.

If the CHRYSANTHYSTAR had been traversing a narrow channel and there was danger of running aground on either hand if speed were reduced, then Appellant's failure to reduce speed could conceivably be justified as a proper exercise of his judgment. But, in this case, the ship was nearing the entrance to the English Channel which is some 80 miles wide. If there was a possibility of being grounded if proceeding at a slower speed, the condition arose because of Appellant's failure to steer a wider course around Lizard Point. Being in such a position of danger, the ship was required to proceed with the utmost precaution. Where the danger is great, the greater should be the precaution. The Clarita (1874), 90 U.S. 1. This again suggests that the speed maintained was excessive in view of the danger of running aground.

The expectation of meeting other vessels in the vicinity is another controlling factor in determining moderate speed in a fog. In his argument, the Investigating Officer quoted from the Sailing Directions for the South Coast of England as follows:

"Traffic conditions in the English Channel require extraordinary caution to prevent collision, and especially so is this the case in hazy or foggy weather. In addition to vessels traversing the channel, there are fleets of trawlers, notably between Start Point and Bill of Portland, and steamers running between English and French ports."

In addition to the normal degree of discretion which should be exercised when a vessel is traveling in fog, special care should be taken when navigating a congested harbor or channel. The Owega (1895), 71 Fed. 537; The Tennessee (1922), 285 Fed. 391. It has been held that if the fog

is very dense, a vessel's speed, at least in waters where any traffic is to be expected, should not exceed bare steerageway. The Martello (1894), 153 U.S. 64; The Pottsville (1882), 12 Fed. 631. This is modified by the statement in The Sagamore (1917), 247 Fed. 743, that:

> "In a fog so dense as existed in this case the right to maintain steerageway and the obligation to go so slow as to be able to avoid a vessel which can be sighted approach inconsistency; but both rules are to be applied so far as is possible."

In The Pennsylvania (1873), 86 U.S. 125, it was said:

> "Our rules of navigation, as well as the British rules, require every steamship when in a fog, "to go at a moderate speed." What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collision, very plainly the speed should be reduced as the risk of meeting vessels is increased."

Since moderate speed varies with the proximity of other vessels and there was great likelihood that there were other vessels close by the CHRYSANTHYSTAR, it was clearly Appellant's duty to have earlier reduced speed considerably more than he did because of the prevailing dense fog.

Appellant further contends that there is nothing in the record to indicate whether the fishing vessel was complying with the rules of navigation at the time of the collision. Since the CHRYSANTHYSTAR was running at an excessive speed, this argument has no merit. It is not a valid defense for a vessel, herself guilty of fault, to contend that the collision would not have occurred if the other vessel had been properly navigated. In the case of The Yoshida Maru (1927), 20 F. 2d 25, it was held that:

> "It is well settled that in case of a collision, the initial fault of one vessel does not exempt the other from the duty of complying with the rules of navigation or of using such precautions as good judgment and good seamanship require to meet the emergency."

Appellant testified that he did not hear any fog signals from the boat nor were any reported to him. This is the only evidence in the record indicating whether the fishing vessel was using the prescribed fog signals. But the fact that fog signals were not heard by the officers and crew of a vessel colliding with another in fog, does not establish that proper signals were not given. The Catalina (1937), 18 F. Supp. 461.

Even making the assumption that the boat was not giving any fog signals, Appellant is not relieved of fault due to the excessive speed of the CHRYSANTHYSTAR. The duty concerning moderate speed in fog is separate from the duty to stop upon hearing the fog signals of another vessel; and, regardless of the latter, there is no right to navigate at full speed. The Automatic (1924), 298 Fed. 607. True, the CHRYSANTHYSTAR was not maintaining full speed but there was a difference of less than half a knot between full speed and the rate at which she was

proceeding. In addition, excessive speed is not excusable even if the vessel collided with had been anchored in the channel. The H.F. Dimock (1896), 77 Fed. 226.

Another important factor to be considered is that although Appellant was in charge of the navigation of the ship, he left the wheelhouse and went to the chartroom. From this location, his visibility of the waters surrounding the ship was completely cut off. This action of the Appellant was particularly careless since the ship was navigating in a heavy fog, it was to be expected that they would meet other vessels in this area and they were near a dangerous point of land. Since Appellant failed to reduce speed in the face of all these hazards to the safety of his ship and others, he was guilty of the offense alleged in the first specification. And the seriousness of this offense is aggravated by the conclusion that the second specification was "not proved" since Appellant was in such a position that he could not see where the ship was going even though he was in charge of the navigation of the vessel.

In connection with Appellant's argument that since this proceeding is penal in nature, it must be strictly construed and therefore no action can be taken against any license other than the one appearing on the specification form, suffice it to say that this is a remedial proceeding, the action is specifically stated to be directed against License No. 14419 (R.1) and the Coast Guard has the authority to revoke or suspend all licenses or certificates for reasonable cause.

Appellant also claims that his constitutional rights were infringed when Appellant's testimony was obtained upon the assurance that no action would be taken against Appellant's person (Point 2). It is evident that the Investigating Officer who made this statement to Appellant at the preliminary investigation was referring only to Coast Guard proceedings under Title 46 United States Code 239(g). His authority could not possible extend to the institution of criminal proceedings against Appellant. There is a statutory requirement (46 United States Code 239(h)) that in cases of evidence of criminal liability, the Commandant of the Coast Guard shall refer all of the evidence and findings, in such investigation, to the Attorney General for investigation and possible prosecution.

Appellant complains that certain statements, depositions, etc., received by the Coast Guard abroad in its investigation of this matter, have not been made available to his inspection and possible use. (Point 3) The following appears in the appeal lodged by counsel:

> "It is respectfully submitted that if the documents in question contain any information which might be in any respect favorable to the defense of Captain Sundlof's case, the withholding thereof should constitute serious and reversible error."

Because of this submission, I have examined the investigation file and find the Coast Guard did receive from the British Ministry of Transport, under confidential cover, four photostatic documents of the "Examination on Oath" signed by Appellant, as Master; the Acting Third Mate and an able seaman of the steam tank ship CHRYSANTHYSTAR; together with a similar document purporting to have been executed by a deckhand who was the sole survivor of the motor ship ENERGETIC. These documents are in the nature of depositions which follow a ritualistic form

until an answer to a specific question permits a narrative statement of the incidents attending the event.

Obviously, these "depositions" form a part of the Coast Guard record in the investigation of this case which could not be made a "public record" under 46 U.S.C. 239. They are classified by the British authorities as "confidential"; and in deference to that authority, the classification will not be either removed or reduced without permission from the British. The Coast Guard discerns no sound reason for requesting that action. Furthermore, even if these documents were subpoenaed, the material would be withheld in accordance with 46 Code of Federal Regulations 136.13-10 because of their confidential classification. Since these depositions are not part of the Record in this proceeding, they will not be considered. Appellant may be assured they contain no information, not already introduced into the case, which would be helpful to his defense.

Because of the liabilities to be determined by civil litigation, I wish to make it emphatically clear that the functions of the Coast Guard should not be used to try such civil liabilities. The primary purpose of Congress which has brought the Coast Guard into these cases, was to assign competent authority to inquire into the causes of disaster, with a view to (1) preventing recurrence, by appropriate regulation - and if necessary, legislation, and, (2) taking appropriate action by suspension or revocation of merchant mariners' documents and licenses held by persons found to be at fault in the disaster under investigation.

Therefore, I esteem it to be my responsibility under all the pertinent statutes and regulations to look, in each case presented to me, for either fault or freedom from fault in the individual. The standards for such determination are most flexible, but follow the recognized standards applicable to the particular offense and the particular individual involved.

CONCLUSION AND ORDER

For the reasons set forth above, the order of the Examiner dated 7 September, 1949, should be, and it is AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 27th day of January, 1950.